

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1157

Summary Calendar

ROBERT B. REICH, Secretary of the United
States Department of Labor, et al.,
Plaintiffs,

versus

PENSION BENEFIT GUARANTY CORPORATION,
on its own behalf and as a statutory
trustee of RETIREMENT PLAN FOR SALARIED
EMPLOYEES OF LUNDBERG INDUSTRIES, LTD., etc.,
Plaintiff-Counter
Defendant-Appellee,

versus

THOMAS D. LUNDBERG, ET AL.,
Defendants,

DAVID J. BOATRIGHT,
Defendant-Counter
Plaintiff-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:88-CV-2470-X c/w 3:88-CV-2471-X)

(February 22, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal

I.

The Secretary of Labor and the Pension Benefit Guaranty Corporation (PBGC), a federal entity that administers the pension plan termination insurance program established by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1301-1461, sued to recover money allegedly illegally removed from three pension plans. The lawsuits maintained that two trustees had breached their fiduciary duties under ERISA, 29 U.S.C. §§ 1104-06, by diverting plan assets to personal accounts, and that several parties, including David Boatright, the plans' actuary, actively and knowingly participated in the transfer.

Boatright denied the allegations and counterclaimed alleging that PBGC knowingly and willfully made false statements causing him irreparable harm and financial loss. PBGC moved to dismiss the counterclaim for lack of subject matter jurisdiction and failure to state a claim. The district court dismissed the counterclaim, stating that Boatright had alleged libel and slander, claims not excepted under the waiver of sovereign immunity in the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671, et seq.

The court then granted PBGC's motion for summary judgment holding Boatright and a trustee jointly and severally liable. Several months later, Boatright filed something akin to a 60(b) motion, requesting that the court reconsider its rulings. PBGC moved the court to enter final judgment against Boatright, pursuant

profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

to Fed. R. Civ. P. 54(b). The court did so, reiterating its dismissal of the counterclaim and reaffirming its summary judgment award. Boatright appealed. We affirm in part and remand in part.

II.

Boatright contends that the district court erred in dismissing his counterclaim because he alleged not libel and slander but injurious falsehood. Our review of this issue is de novo, see Hobbs v. Hawkins, 968 F.2d 471, 475 (5th Cir. 1992). To state a claim for injurious falsehood, Boatright had to allege pecuniary harm resulting from the unprivileged publication of false statements, with knowledge or reckless disregard of the falsity concerning his property or product. See Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151, 1155 n.6 (D.C. Cir. 1985).

Boatright maintains that the false statements by PBGC cost him the livelihood and profit of his occupation as "Enrolled Actuary." The statements regarded his performance as actuary. Boatright does not have a protectible property interest in his employment. See American Fed'n of Gov't Employees v. Stetson, 640 F.2d 642, 645 (5th Cir. 1981).

Boatright argues, for the first time on appeal, that his counterclaim was malicious prosecution and abuse of process by a federal investigative officer. See 28 U.S.C. § 2680. We will not consider issues raised for the first time on appeal unless they are purely legal in nature and refusal to consider them would result in manifest injustice. United States v. Garcia-Pillado, 898 F.2d 36,

39 (5th Cir. 1990). Boatright has not presented any facts, either to the district court or on appeal, as to the official status of the culpable person. As this claim involves a factual determination, we will not address it.

III.

Boatright alleges that the district court erred in denying his Rule 60(b) motion to set aside the summary judgment against him. The district court did not mention Boatright's Rule 60(b) motion and did not explicitly rule on it. As the district court entered a final judgment under Rule 54(b) following filings on the Rule 60(b) motion, the court's final judgment can be construed as an implicit denial of the motion. See Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663, 666 (5th Cir.), cert. denied, 454 U.S. 1098 (1981). But doing so adds nothing. The summary judgment was interlocutory when Boatright filed his 60(b) motion. So he, in effect, simply asked for reconsideration of an interlocutory ruling. The district court declined to reconsider and entered a 54(b) certificate.

IV.

One matter remains. When the district court ruled, Boatright's knowing participation in a breach of trust made him jointly and severally liable with the fiduciary-in-breach. Since then, the Supreme Court has held that ERISA does not authorize suits for money damages against non-fiduciaries who knowingly participate in a breach of fiduciary duty. See Mertens v. Hewitt Associates, 113 S.Ct. 2063, 2066-72 (1993). Mertens may conflict

with the district court's award of damages against Boatright. We remand for decision of whether Boatright is a fiduciary and, if he is not, whether the damage award is appropriate.

AFFIRMED IN PART and REMANDED IN PART.